(15) (15)

Nos. 99-1687 & 99-1728

Supreme Court, U.S.
FILED
OCT 25 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GLORIA BARTNICKI, *et al.*,

Petitioners,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding eighty years ago, the ACLU has supported the right of the press to publish free from government interference and has appeared before this Court on numerous occasions to defend that right. The ACLU has also long advocated in favor of privacy rights, including the right to engage in confidential telephone conversations. Because both rights are at issue in this case, the proper resolution of this controversy is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

From 1992 to 1994, the Wyoming Valley West School District was involved in contentious contract negotiations with the local teachers' union. The chief negotiator for the union was Gloria Bartnicki, and the local union's president was Anthony Kane.

On May 13, 1993, Bartnicki and Kane had a cellular telephone conversation about the salary gap between the union's contract proposal and the offer by the school board. During the course of the conversation, Kane told Bartnicki:

> If they're not going to move for three percent,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

> we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, "we'll meet and discuss this." You don't discuss the items in public.

Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999).

An unknown person intercepted and recorded the call between Bartnicki and Kane. Shortly thereafter, a tape of the conversation was anonymously dropped in the mailbox of Jack Yokum, the head of a local taxpayers' association formed solely to oppose the bargaining demands of the teachers' union. Yokum listened to the tape and, recognizing Bartnicki and Kane's voices, turned over copies of the tape to at least one local radio station, WILK Radio. A talk show host on that station, Frederick W. Vopper, played part of the tape repeatedly on his radio news/public affairs talk show, which was broadcast simultaneously over WILK Radio and WGBI Radio.

Following these broadcasts, Bartnicki and Kane sued Yokum, Vopper, WILK Radio, and WGBI Radio under both federal and state law in the United States District Court for the Middle District of Pennsylvania.[2] They based their federal claim on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510 *et seq*. Title III, the principal federal wiretapping statute, prohibits the illegal interception of wire, oral, or electronic communications. *See* 18 U.S.C. §2511(1)(a). In addition, the statute makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [Title III]." 18 U.S.C. §2511(1)(c).

[2] Throughout this brief, *amici* will refer to Vopper, the radio stations, and Yokum collectively as either the "media defendants" or "the press."

Bartnicki, Kane, and the media defendants all eventually moved for summary judgment. The district court denied the cross-motions and, in doing so, held that the application of Title III to the defendants' actions would not violate the First Amendment. The district court did, however, subsequently certify the First Amendment question for interlocutory appeal.

On interlocutory appeal by the defendants, the Third Circuit reversed. *See Bartnicki*, 200 F.3d at 129. At issue, the court stated, was "whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants . . . played no direct or indirect role in the interception." *Id.* at 112. In order to answer this question, the court first determined that, despite what it considered to be a plausible argument that Title III should be subject to strict scrutiny, intermediate scrutiny was appropriate. The court then held that Title III failed intermediate scrutiny. Dissenting, Judge Pollak agreed with the majority's application of intermediate scrutiny but disagreed with its application of that standard. *See id.* at 129-36. In his view, Title III's nondisclosure provision advanced the government's interest in protecting privacy in a manner sufficiently tailored to survive intermediate scrutiny.

SUMMARY OF ARGUMENT

The central issue in this case is one that the Court has confronted on several occasions: May the government, in order to protect privacy or confidentiality, punish the press for publishing truthful, newsworthy information that the press has lawfully obtained? In the past, the Court has regarded such efforts to limit the press's right to publish with great skepticism, and has consistently invalidated them. While the petitioners today invite the Court to adopt a novel approach that would undermine the Court's traditional press protections, *amici* urge the Court to continue to read the First Amendment as it has before. The value of personal privacy must not be slighted, but the restriction on speech at issue in this case is an inappropriate means of protecting the undeniably important privacy interest at stake.

For two reasons, the Court should evaluate the application of Title III to the media defendants under strict scrutiny. First, strict scrutiny is appropriate because Title III's application in this case would impinge upon the editorial autonomy of the media by prohibiting the press from publishing truthful, newsworthy information. The preservation of editorial autonomy has been a cornerstone of the Court's First Amendment jurisprudence. Accordingly, the Court has stated on several occasions that the government may restrict the press's editorial judgments about what to publish, if at all, only when the government demonstrates that the restriction is necessary to further a state interest of the highest order. On the facts of this case, Title III's application would represent a substantial restriction on the press's freedom to publish as it sees fit. Strict scrutiny should therefore apply.

Strict scrutiny should also be applied to Title III's application in this case because the statute's disclosure prohibition is a content-based restriction on speech by the media. Like most regulations the Court has considered content

based, Title III's disclosure provision expressly conditions liability on the content of speech. Furthermore, the provision's restraint on speech is principally justified on the basis of a concern that is directly tied to content. In this case, specifically, one of plaintiffs' principal claims is that the public disclosure of plaintiffs' confidential conversation revealed information that was intended to be private. Under this Court's precedents, a statute that focuses so clearly on the communicative impact of the media's speech is content based.

On these facts, moreover, Title III's application cannot survive strict scrutiny. *Amici* readily acknowledge the government's compelling interest in preserving the privacy of confidential communications. The government, however, has failed to meet its burden of demonstrating the inadequacy of less restrictive alternatives to accomplish that goal including, most obviously, more vigorous enforcement of the prohibition against illegal wiretaps that is already a part of Title III. The increasing availability of technological solutions to the problem of wireless security is also relevant in this case, as it has been in several of the Court's other recent cases. In short, petitioners have failed to show that the use of Title III against the media defendants is either necessary or appropriate.

ARGUMENT

I. STRICT SCRUTINY IS THE APPROPRIATE CONSTITUTIONAL STANDARD TO APPLY IN THIS CASE

"There is little need to reiterate that the freedoms of speech and press rank among our most cherished liberties." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973). Nevertheless, not all regulations affecting speech or press are subject to the same

scrutiny by the Court. Accordingly, the Court must first determine what level of scrutiny is appropriate to review the application of Title III to the facts of this case. Because, on these facts, Title III's disclosure prohibition impermissibly interferes with the editorial autonomy of the press, the use of Title III against the press in this case should be subject to the most exacting scrutiny. Moreover, because the application of Title III against the press in this case proscribes speech based on its direct communicative impact, the disclosure prohibition falls squarely within the Court's well-established definition of content-based speech regulations, which are subject to strict scrutiny.

A. On The Facts Of This Case, Title III's Disclosure Prohibition Intrudes Upon The Editorial Autonomy Of The Press

An independent press is essential to the viability of our democratic system of government. The free press's central importance stems from two features of American politics: the "fundamental principle of our constitutional system" that the responsiveness of government to the people depends crucially on sustaining an "uninhibited, robust, and wide-open" debate on issues of public significance, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966); and the oft-acknowledged fact that the press has historically played, and must continue to play, an essential role in furthering that debate. *See, e.g., id.* at 219 ("[T]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs"). As the Court recognized in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), "[t]he newspapers, magazines, and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and . . . informed public

opinion is one of the most potent of all restraints upon misgovernment." *Id.* at 250.

Because the legitimacy of our political institutions depends to a large extent on the existence of a free press, the Court has repeatedly concluded that the First Amendment's Speech and Press Clauses were designed to safeguard the press's independence from government intrusion. Editorial autonomy lies at the core of that independence and, for that reason, the Court has consistently rebuffed government attempts to limit the press's freedom to make editorial judgments. Whether the restrictions on editorial autonomy have taken the form of financial restraints on certain publications, *see Grosjean*, 297 U.S. at 249-50; restrictions against the publication of truthful, newsworthy information that the press acquired lawfully, *see, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 530-40 (1989); *Mills*, 384 U.S. at 218-19; or requirements that the press publish information against its will, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), the Court has concluded that the restrictions were inconsistent with the "preserv[ation] [of] an untrammeled press as a vital source of public information." *Grosjean*, 397 U.S. at 250. The tradition against restraints on editorial independence is thus well-established.

In rejecting restrictions on editorial autonomy, the Court has emphasized that any government intrusion into the press's editorial process will almost certainly be invalidated.[3] For example, in *Miami Herald*, the Court consid-

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[3] As the language quoted below makes clear, both *Miami Herald* and *Mills* indicate that there may not be *any* circumstances under which government interference with editorial autonomy is permissible. That observation, of course, suggests adopting a *per se* rule of invalidity for government actions that interfere with the independence of editorial judgments. In fact, Justice Kennedy has urged the adoption of such a

(continued...)

ered the constitutionality of a "right of reply" statute that required any newspaper publishing an editorial criticizing a candidate to print the candidate's reply to the criticism. *See* 418 U.S. at 244. Concluding that the statute "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors," the Court held:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258 (footnote omitted). Likewise, the Court held in *Mills* "that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment" when that law impinges on the editorial judgment of the press by prohibiting the press from publishing certain editorials on an election day. 384 U.S. at 220.

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[3] (...continued)
rule on at least one occasion, *see Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991)(Kennedy, J., concurring in the judgment)(arguing that when a regulation imposes "restrictions on authors and publishers, using as its sole criterion the content of what is written," the regulation is *per se* invalid, and it is "both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end" (internal quotation marks omitted)), and the Court has elsewhere leaned towards the application of a *per se* rule in a similar context, *see Miami Herald*, 418 U.S. at 256 ("The clear implication [of our previous cases] has been that *any* such compulsion to publish that which reason tells [the press] should not be published is unconstitutional" (emphasis added)(internal quotation marks omitted)).

The Court's firm protection of editorial autonomy is highlighted by a string of cases which have presented, in different contexts, "the conflict between truthful reporting and state protected privacy interests." *Florida Star*, 491 U.S. at 530. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court found unconstitutional a civil damage award against a television station for broadcasting the name of a rape victim in violation of a law that prohibited the publication of the victim's name. In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the Court vacated as unconstitutional a pretrial order enjoining a newspaper from publishing the name or picture of an eleven-year-old boy on trial for second-degree murder. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court held that Virginia could not constitutionally punish a newspaper for publishing truthful information regarding confidential proceedings of the state's Judicial Inquiry and Review Commission. In *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97 (1979), the Court ruled unconstitutional a West Virginia statute that made it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of a child charged as a juvenile offender. Finally, in *Florida Star*, 491 U.S. at 530-41, the Court held that the First Amendment did not permit Florida to punish a newspaper for publishing the name of a rape victim that the paper had obtained from a police report.

In each of these cases, the Court's skepticism about regulations that restrict editorial independence drove its careful scrutiny of the restrictions at issue. The Court stressed the value of "protect[ing] the freedom of the press to report and criticize" as it sees fit, *Landmark*, 435 U.S. at 840, and the constitutional importance of "rel[ying] . . . upon the judgment of those who decide what to publish or broadcast." *Cox*, 420 U.S. at 496 (citing *Miami Herald*). Because of

the magnitude of these interests, the Court made clear, even in the earliest cases discussing the issue, "that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 442 U.S. at 102 (discussing *Landmark* and *Cox*). Building on these decisions, *Florida Star* and *Daily Mail* emphasized that editorial judgments about what to publish may be overturned, if at all, only under very limited circumstances: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail*, 442 U.S. at 103; *Florida Star*, 491 U.S. at 533. In short, strict scrutiny applies.

In the few instances in which the Court has upheld restrictions on what the press may publish, it has taken great pains to emphasize that those restrictions did not undermine the traditional protection that the First Amendment provides to editorial autonomy. For example, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, the Court upheld the power of the government to prohibit discriminatory classified advertisements. The Court carefully circumscribed its holding, however, making clear that its decision rested on the fact that the newspaper's actions involved only commercial speech -- which, because the case was decided prior to *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), was largely unprotected by the First Amendment. Moreover, in setting forth its holding, the Court "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views on [issues], however controversial." *Pittsburgh Press*, 413 U.S. at 391; *see also Miami Herald*, 418 U.S. at 255 (reaffirming the narrowness of the holding in *Pittsburgh Press*).

The Court's decisions in *Cohen v. Cowles Media Co.*,

501 U.S. 663 (1991), and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), present similarly limited holdings. In *Cowles Media*, the Court upheld the application of promissory estoppel to enforce a pledge of confidentiality given by a reporter to a news source in exchange for information. The Court pointed out that, far from undermining editorial autonomy, its ruling simply enforced the newspaper's voluntary editorial judgment to enter into the agreement and restrict its own authority to publish the source's name. *See Cowles Media*, 501 U.S. at 670-71. And, in *Seattle Times*, where the Court upheld a protective order prohibiting the defendant newspaper from publishing information that it acquired through discovery, the Court stressed that the protective order regulated the press only in its capacity as a party-litigant. Because the newspaper obtained the information by virtue of its position as a party-litigant, the Court concluded, the trial court could condition the release of the information to the paper on the paper's agreeing to limitations on its use. *See Seattle Times*, 467 U.S. at 32.[4]

In our view, the Court's strong presumption of invalidity in cases like *Miami Herald* and *Mills*, combined with its clear application of strict scrutiny in *Florida Star* and *Daily Mail*, demonstrates that similar restrictions on the editorial autonomy of the press may be upheld only if they serve a

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[4] In other cases involving regulations affecting the press, the Court has similarly emphasized the absence of any impingement on editorial independence. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)(stressing that a judgment requiring reporters to testify before a grand jury "involve[s] no intrusion[] upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold"); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)(noting that application of the Sherman Antitrust Act to the press did not "interfere[] with freedom to print as and how one's reason or one's interest dictates" (internal quotation marks omitted)).

compelling government purpose and are narrowly tailored to further that interest. The application of Title III in the present case presents just such a restriction: the press lawfully obtained truthful information about a matter of public significance, and the enforcement of Title III in this case will punish publication of that information.

The fact that an unknown third party violated the wiretap provisions in order to provide the press with the information at issue in this case does not, as petitioners suggest, reduce the relevance of the earlier cases involving editorial autonomy. Similar violations by third parties apparently occurred in two of those earlier cases, which refutes any suggestions that the present case is unique. In *Landmark*, the press acquired information regarding a judicial inquiry only by virtue of the fact that a participant to that proceeding had violated a state statute prohibiting participants from disclosing information related to the proceeding. *See Landmark*, 435 U.S. at 830 n.1, 832. Similarly, in *Florida Star*, the Court explicitly acknowledged that the press had obtained the information at issue only because a third party -- in that case a Florida Police Department -- had violated a state statute. *See Florida Star*, 491 U.S. at 536. Despite these violations, the Court concluded in both cases that the press had lawfully acquired the information at issue. *See id.* at 536; *Landmark*, 435 U.S. at 837. And, in both cases, the conduct of the third parties was irrelevant to the Court's analysis.[5]

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[5] In a footnote in *Florida Star*, the Court stated that it was not "settl[ing] the issue whether, in cases where information has been acquired *unlawfully* by a newspaper, or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 534 n.8 (emphasis in original). Petitioners contend that this footnote renders *Cox*, *Landmark*, *Daily Mail*, and *Florida Star* irrelevant to any case in which a party responsible for the press's acquisition of information engaged in unlawful activity. In light of the fact that there (continued...)

Nor does the third party's illegal conduct in the present case undermine the reasons supporting the application of strict scrutiny to laws impinging on editorial autonomy. In the case law discussed above, it was the value of editorial independence -- the interest in protecting the press's right to "decide what to publish or broadcast" -- that led the Court to apply strict scrutiny. *Cox*, 420 U.S. at 496. This value does not suddenly shrink in importance when a competing interest -- such as the state's obviously important interest in protecting against illegal breaches of privacy -- is also at stake. Because the value driving the application of strict scrutiny in prior cases remains undiminished in the present case, the application of Title III to the media defendants in this case should be strictly scrutinized. *See Florida Star*, 491 U.S. at 530 (acknowledging "[t]he tension between the right which the First Amendment accords to a free press . . . and the protections . . . accord[ed] to personal privacy against the publication of truthful information," but concluding that strict scrutiny provides the appropriate mechanism for evaluating that tension). This conclusion does not ignore the importance of the privacy interest in tension with the value of editorial autonomy. Rather, it merely points out that the government's important privacy interests must be accounted for in the evaluation of strict scrutiny, rather than by discarding that evaluation altogether.

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[5] (...continued)
was unlawful activity by third parties in both *Landmark* and *Florida Star*, however, petitioners' effort to interpret the footnote so broadly is unpersuasive. While the footnote is somewhat ambiguous, its citation to *Landmark* strongly suggests that the footnote refers to the issue of punishing a party who is involved in the illegal acquisition. This was the issue the *Landmark* Court reserved: "We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Landmark*, 435 U.S. at 837. Likewise, that issue is not presented here.

B. On The Facts Of This Case, Title III's Disclosure Prohibition Represents A Content-Based Restriction On Speech By The Media

In order to apply intermediate scrutiny to Title III's disclosure prohibition, the Third Circuit was compelled to conclude that the application of the law to these facts constituted a content-neutral speech regulation. *Amici* respectfully disagree with this determination.

Under the Court's cases, the principal inquiry in determining content neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Boos v. Barry*, 485 U.S. 312, 320-21 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Therefore, government regulation of speech is ordinarily considered content based if it employs categories that differentiate between instances of speech based upon content or otherwise expressly conditions regulation on the content of speech. *See, e.g., Boos*, 485 U.S. at 319. In other words, if one must examine the content of the defendant's speech in order to determine whether that speech is prohibited, the regulation is ordinarily deemed content based. In the present case, it is only because of the specific content of the speech by the radio station that the plaintiffs' privacy was breached and the statute violated. Had different content been broadcast by the radio station -- content that did not reveal the substance of the telephone conversation between the plaintiffs -- there would have been no liability under the statute.

It is true, as petitioners assert, that even regulations that expressly condition liability on the content of speech have,

on occasion, been characterized as content neutral when the Court has been persuaded that the actual justification for the regulation is unrelated to speech. For example, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a zoning ordinance that applied only to theaters showing sexually explicit films because the state's asserted concern was not with the content of the films but with the "secondary effects" of crime and prostitution. *Cf. Hill v. Colorado*, 530 U.S. __, 120 S.Ct. 2480 (2000). But, to prevent that exception from swallowing the rule, the Court has repeatedly stressed that regulations cannot be described as content neutral if they are justified by a concern that flows directly from the communicative impact of speech itself. *See Boos*, 485 U.S. at 321; *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. __, 120 S.Ct. 1878, 1885 (2000)(holding that regulations that are justified "on the content of the [regulated] speech and the direct impact that speech has on its listeners" are content based).[6]

The effort to enforce Title III's disclosure prohibition against the media defendants here both conditions the media's liability on the content of its speech and justifies its liability, at least in part, on the basis that the communicative impact of the prohibited speech is harmful. The government does not seriously quarrel with the former observation, but does strenuously dispute the latter. Yet, as the government itself acknowledges, two distinct injuries to privacy rights flow from the unlawful interception and disclosure of an electronic communication: an invasion of privacy that oc-

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[6] The Court has also upheld the regulation of symbolic expression when the state's interest is targeted at the nonexpressive element of the act and the impact on speech is only "incidental." *United States v. O'Brien*, 391 U.S. 367, 382 (1968). This case, however, involves an act of pure expression, not symbolic expression, and the impact on speech is not incidental, but direct. Thus, the *O'Brien* doctrine does not apply.

curs when the communication is intercepted, and a further violation that occurs when the private communication is publicly revealed. According to the government, a central justification for the disclosure prohibition is that it serves to prevent this second injury, by "directly guard[ing] against th[e] further intrusion into the integrity of private communications" that occurs upon disclosure. *See* Gov't Br. at 34. But it is the communicative impact of the defendants' speech that itself constitutes this further breach of privacy. Hence, the logic of the government's own argument demonstrates that Title III was designed to prohibit the communicative impact of the defendants' speech because of an injury caused by that communicative impact.[7]

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[7] Substantially different issues are raised by regulations limiting the use or disclosure of personal data that companies or service providers acquire in the course of their relationships with consumers or clients. For example, the Fair Credit Reporting Act provides that a credit agency may release a consumer's credit report only to certain entities under certain conditions, and criminalizes unauthorized disclosures by employees of the consumer reporting agency. *See* Fair Credit Reporting Act, 15 U.S.C. §1681r (Supp. III 1997); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. §2710 (1994)(prohibiting disclosure of a consumer's video rental records). Similarly, the Secretary of Health and Human Services, acting pursuant to section 264 of the Health Insurance Portability and Accountability Act of 1996, will soon be issuing regulations limiting the disclosure of sensitive medical information. Pub.L.No. 104-191, 110 Stat. 1936.

Strict scrutiny does not generally apply when the government regulates the use of information by parties to a pre-existing commercial or professional relationship, or when it regulates commercial speech. Unlike this case, such regulations do not intrude upon the editorial discretion of the press to speak on matters of public concern. Moreover, unlike Title III's nondisclosure provision, a regulation restricting the use and disclosure of consumer information often represents the only means by which the confidentiality of that information can be preserved. *See* Point II, *infra*.

For these reasons, the content-based prohibition in Title III is strikingly similar to the regulation invalidated by the Court in *Boos v. Barry*, 485 U.S. 312. In *Boos*, a provision of the District of Columbia code prohibited the display of signs criticizing a foreign government within 500 feet of that government's embassy. That regulation, like Title III, was justified on the ground that the communicative impact of the proscribed speech itself inflicted an injury -- in *Boos*, by subjecting foreign diplomatic personnel to the indignity of confronting speech unflattering to their government. *See id.* at 321. Accordingly, Justice O'Connor, speaking for a majority of the Court, concluded that the most exacting scrutiny was required:

> [The government] rel[ies] on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

Id. at 321.[8]

By contrast, in *Hill v. Colorado*, 120 S.Ct. 2480, the Court recently upheld a statute regulating speech activities as content neutral because, in the Court's view, the statute

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[8] While a portion of Justice O'Connor's opinion spoke for only a plurality of the Court, a majority of the Court joined her conclusion that the regulation merited strict scrutiny because its justification was based on the communicative impact of the regulated speech. *See Boos*, 485 U.S. at 334 (Brennan, J., concurring in part and concurring in the judgment).

was designed to prevent a harmful, nonexpressive feature of the regulated act. At issue in *Hill* was the validity of a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, for any person to "'knowingly approach' within eight feet of another person, without that person's consent," for the purpose of "engaging in oral protest, education, or counseling with such other person." *Id.* at 2484. Although the action prohibited by the statute -- like the action prohibited in *O'Brien* -- undoubtedly encompassed elements of expression, the Court concluded that the prohibition was valid because it was designed to prevent the overly aggressive invasion of personal space by protesters, and not to prevent the communicative impact of the protesters' speech. The Court concluded that, unlike a regulation premised on the notion that the harm associated with "oral protest, education, or counseling" flowed from the communicative impact of those activities, "the [Colorado] statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient." 120 S.Ct. at 2493; *see also id.* at 2495-96.[9]

Consistent with *Hill* and *Boos*, the government agrees that a regulation is content based if it is justified on the basis of the communicative impact of speech. *See* Gov't Br. at 19. Nevertheless, it argues that because Title III's

[9] Concurring, Justice Souter further emphasized the nonexpressive justification for the Colorado statute: "The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches go to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close." *Hill*, 120 S.Ct. at 2501 (Souter, J., concurring).

application depends in part on the means by which the communication is obtained, liability is not in fact justified based on the communicative impact of speech. The conclusion does not follow from the premise. Although liability in this case may not be assessed without reference to some feature in addition to the content of the speech itself, the same was true in *Boos*. Because the law at issue in that case proscribed certain speech only within 500 feet of a government embassy, liability depended in part on the location of the speech. Had the petitioners in *Boos* sought to display *identical* signs at a location that was not within 500 feet of an embassy, the statute would not have prohibited their speech. *See id.* at 315. This fact, however, was irrelevant to Justice O'Connor's analysis in *Boos*: what mattered was the fact that liability was *justified* on the basis of content. *See id.* at 321. As in *Boos*, it is irrelevant to the content-neutrality determination in the present case that liability may not be assessed without reference to the source of respondents' speech. Liability is justified on the ground that the communicative impact of respondents' speech should be proscribed, and that fact renders Title III content based on these facts.

The Third Circuit did not disagree with the foregoing analysis. Indeed, the court below acknowledged that "there is a not implausible argument that the injury associated with the disclosure of private facts stems from the communicative impact of speech that contains those facts." *Bartnicki*, 200 F.3d at 123. After suggesting that the government's privacy-protecting justification was sufficient to render Title III's nondisclosure provision content based, however, the Third Circuit nonetheless concluded that the provision was content neutral. Specifically, the court reasoned that the disclosure prohibition is content neutral because the government proffered an additional justification for the statute -- reducing the market for wiretapped information -- which,

the government alleges, is not based on the communicative impact of the regulated speech.[10]

The flaw in the government's logic is that its market rationale is inextricably tied to its overlapping concern about revealing the contents of an illegally intercepted conversation. Society cares about preventing the initial interception of confidential communications in significant measure because we do not want the content of those communications to be made public. A market in stolen conversations is therefore fundamentally different than a market in stolen jewelry, and the difference lies squarely in our concern about the communicative impact of the unauthorized disclosure. Under the Court's jurisprudence, enforcement of that concern against the media cannot be described as content neutral.

II. TITLE III'S DISCLOSURE PROHIBITION IS AN INAPPROPRIATE MEANS OF FURTHERING THE GOVERNMENT'S COMPELLING INTEREST IN PRESERVING PRIVACY IN THIS CASE

For the foregoing reasons, Title III must be subject to strict scrutiny. Thus, the government is required to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). While *amici* agree that the interest in protecting the confidentiality of private, electronic communications is compelling, *cf. Katz*

[10] The Court has accepted the market rationale in its child pornography decisions. *See New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990). But those cases, unlike this case, involved unprotected speech.

v. United States, 389 U.S. 347, 352 (1967), applying Title III's disclosure prohibition against the media is not the least restrictive means of achieving that goal.

A narrow fit between means and ends is always critical in the First Amendment context, where prophylactic rules are traditionally disfavored.[11] *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963)("Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms"); *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Such a fit is even more important in a case like this one where a restriction on speech not only deprives the speaker of important First Amendment rights, *see* Point I, *supra*, but also deprives the general public of potentially valuable information on matters of general concern. If the government could prohibit the press from publishing information that a source had either unlawfully obtained or unlawfully disclosed, many important stories would never be reported, from government misconduct to corporate malfeasance. Similarly, if the government's market rationale is correct and the government is free to prohibit press coverage of criminal activities that are carried out in part to generate publicity, then a broad range of stories could constitutionally be banned, from acts of civil disobedience to hostage takings.

This Court has never treated that approach as a less restrictive alternative under its First Amendment jurispru-

[11] The Court has stressed that even content-neutral regulations that only incidentally burden speech may not restrict "substantially more speech than is necessary to further the government's legitimate interests." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward*, 491 U.S. at 799). In this as-applied challenge, the restriction on speech is neither content neutral nor incidental. Thus, a closer fit between means and ends is constitutionally compelled.

dence. To the contrary, the Court has consistently invalidated restrictions on the media's ability to publish truthful, newsworthy information even when those restrictions were adopted in pursuit of obviously worthwhile goals. *See Cox*, 420 U.S. at 496-97; *Oklahoma Publishing*, 430 U.S. at 311-12; *Landmark*, 435 U.S. at 842; *Daily Mail*, 442 U.S. at 106; *Florida Star*, 491 U.S. at 541; *Butterworth v. Smith*, 494 U.S. 624, 636 (1990). There was little doubt in each of the cases cited above that the interests at stake -- which included preserving the confidentiality of rape victims' names and juvenile offenders' identities -- were extremely important. Nevertheless, the costs of depriving the public of newsworthy information weighed heavily in the Court's inquiry into whether the regulations at issue were narrowly tailored. *See, e.g., Butterworth*, 494 U.S. at 635-36 (emphasizing the fact that the grand jury secrecy regulation at issue could keep from the public information regarding "unlawful conduct or irregularities on the part of public officials").

Because application of Title III's disclosure provision against the media in this as-applied challenge is subject to strict scrutiny, it may be upheld only if there is no less restrictive manner of furthering the government's compelling interest in preserving privacy. *See, e.g., Boos*, 485 U.S. at 325-29. "If a less intrusive alternative would serve the government's purpose, the legislature must use that alternative." *Playboy*, 120 S.Ct. at 1886; *see also Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). Moreover, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 129 (quoting *Landmark*, 435 U.S. at 843). The fact that the legislature has opted for a prophylactic response merely raises the question of less restrictive alternatives, it does not provide the answer. "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a

check on legislative power would be nullified." *Landmark*, 435 U.S. at 844.

In this case, there plainly is a less restrictive alternative available: prohibiting the interception of electronic communications in the first place, and then punishing those who directly engage in such illegal conduct. In fact, this less restrictive prohibition, which Title III already includes, is strikingly similar to the less restrictive alternatives that existed in the earlier cases, discussed in Point I, *supra*, where the Court struck down analogous restrictions on the publication of truthful, newsworthy information by the press. *See, e.g., Florida Star*, 491 U.S. at 538 (emphasizing that "the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech"). Unlike Title III's nondisclosure provision, the prohibition on interception does nothing to impair editorial autonomy. Yet by deterring would-be interceptors, the interception prohibition protects the same privacy interest promoted by the significantly more restrictive prohibition on disclosure. For if the initial interception never occurs, there is no intercepted communication for the press to publish.

"When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 120 S.Ct. at 1888. The government has not met its burden here. It contends that, despite the fact that Title III already prohibits the interception of electronic communications, the confidentiality of those communications cannot be preserved without Title III's disclosure prohibition. The reason, according to the government, is that there is no hope of discovering and prosecuting the individuals that actually illegally intercept the communications. While it is certainly easier to identify and punish the media -- whose violation of the statute is very public --

than it is to identify and punish the illegal interceptor, the fact that it may be challenging to enforce a law does not justify suppressing the freedom of the press. Moreover, the government provides no real support for its claim that law enforcement is incapable of finding individuals who illegally intercept electronic communications. In fact, anecdotal evidence suggests otherwise. As respondents point out in their brief, the identity of the illegal interceptor was known in a large percentage of the reported federal cases involving Title III. Were it nearly impossible for law enforcement officials to discover the identity of these perpetrators, as the government suggests, one would not expect them to appear as defendants so frequently. *Cf. Playboy*, 120 S.Ct. at 1891.

The fact that the government does not prohibit the press from publishing confidential information in other regulatory contexts that present similar enforcement challenges further undermines the government's assertion that it is necessary to gag the press in order to protect the confidentiality of electronic communications. In the grand jury context, for example, federal law prohibits grand jurors, interpreters, stenographers, and others from revealing information that they learn during the course of grand jury proceedings. *See* Fed. R.Crim.P. 6(e)(2). But, as with illegally intercepted communications, any information acquired during a grand jury proceeding can easily be provided to the press anonymously. For this reason, enforcing the confidentiality requirement regarding grand jury proceedings presents difficulties similar to those present in the wiretapping context. Despite the government's legitimate interests in grand jury secrecy, however, *see, e.g., Butterworth*, 494 U.S. at 629-35, the government does not prohibit the press from publishing information that is illegally leaked from a grand jury. The government's choice to criminalize only the leaking (and not the publication) of grand jury information weakens its contention that limitations on the press's editorial autonomy are

necessary to preserve the privacy of confidential communications.

"The feasibility of a technological approach" to protecting the privacy of electronic communications reinforces the conclusion that Title III's disclosure prohibition is not narrowly tailored. *Playboy*, 120 S.Ct. at 1887. In several recent cases, the availability of technological solutions to the problem targeted by the government has been important to the Court's decision to invalidate the regulation at issue. *See id.* at 1887, 1891; *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997); *Sable Communications*, 492 U.S. at 128, 130-31. Moreover, the technological solutions need not already be in widespread use to be relevant to the Court's inquiry. In *Reno v. ACLU*, for example, "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant" to the Court's invalidation of a cyberspeech regulation. *Playboy*, 120 S.Ct. at 1887 (quoting *Reno*, 521 U.S. at 876-77). In the present case, recent advances in private technology have substantially improved the confidentiality of wireless and other electronic communications. The steady transition towards digital wireless communication networks in the last few years has made interception substantially more difficult. And, with the increasing availability of strong encryption technology, wireless communications will soon become even more secure.

Given these alternative options, a direct restraint on the press, of the sort presented here, is neither a less restrictive alternative nor a constitutionally acceptable response. *Cf. Sable Communications*, 492 U.S. at 130 (placing the burden on the government to demonstrate that a less restrictive technological solution to restricting dial-a-porn messages to adults was ineffective).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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Dated: October 25, 2000